No. 16-1466

In the Supreme Court of the United States

MARK JANUS,

Petitioner,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Seventh Circuit

BRIEF OF CONSTITUTIONAL LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici are professors of law who teach and write about constitutional law. They have substantial expertise in the text, history, and structure of the Constitution, as well as the Court's decisions relating to the doctrine of *stare decisis*. Their legal expertise thus bears directly on the constitutional issues before the Court.[1] *Amici* are Walter E. Dellinger III, Douglas B. Maggs Professor Emeritus of Law, Duke University School of Law; Michael H. Gottesman, Professor of Law, Georgetown University Law Center; William P. Marshall, William Rand Kenan, Jr. Distinguished Professor of Law, University of North Carolina School of Law; and David A. Strauss, Gerald Ratner Distinguished Service Professor of Law, University of Chicago Law School.[2]

SUMMARY OF ARGUMENT

Stare decisis—a foundational principle of our legal system—establishes a strong presumption favoring adherence to precedent in order to maintain respect for the rule of law and cabin judicial discretion. Concluding that a prior decision interpreting the Constitution may be wrong is not sufficient to justify overruling. Rather, the Court must find a "special justification" to disregard the presumption and take

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' blanket consents to the filing of *amicus* briefs are on file with the Clerk.

[2] Institutional affiliations are provided for identification purposes only.

that unusual step. *United States* v. *IBM*, 517 U.S. 843, 856 (1996).

That justification is rarely present. Indeed, in the seventy-seven years between 1940 and 2017, the Court has expressly overruled only ninety-four binding constitutional precedents—roughly one case per Term. And when it has overturned prior decisions, it has most often done so unanimously or nearly unanimously.

The Court's reluctance to overrule precedent has not only promoted stability of the law, but has also protected the credibility of the Judiciary. At a time of great public skepticism about all government institutions, it is more important than ever for courts, and particularly the Nation's highest Court, to adhere to the settled principles of restraint that set the Judiciary apart from the political branches.

That is particularly true here because all of the relevant factors weigh strongly against overruling *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977).

First, overruling *Abood* will significantly disrupt settled legal rules in related areas. The principle on which *Abood* rests—that "government has significantly greater leeway in its dealings with citizen employees," *Engquist* v. *Oregon Dep't of Agric.*, 553 U.S. 591, 599 (2008)—also supports this Court's decision in *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), holding that the government may impose restrictions on its employees' speech that would violate the First Amendment if applied to the citizenry at large.

Because the legal principle underlying *Pickering* and *Abood* is essentially identical, overruling *Abood*

would undermine the more relaxed First Amendment standards governing government regulation of employee speech applied in *Pickering* and its progeny:

- If the government's interest as an employer is not sufficiently weighty to justify limitations on employees' associational activities, it also could not support *Pickering*'s limitations in the employee speech context, and overturning *Abood* therefore will necessarily reduce the scope of regulation permissible in the workplace speech context;
- The reduction in government employers' existing authority would be substantial, because the impact of *Abood* on employees' constitutional rights is much more limited than that of *Pickering* (employees remain free to express their views in other forums), and if *Abood* were held to work an unconstitutional intrusion on employees' First Amendment rights, then *a fortiori* many restrictions upheld under *Pickering* will become unconstitutional; and
- Overruling *Abood* would elevate internal workplace speech about wages and benefits to the status of matters of public concern—drastically limiting the authority afforded to government employers under *Pickering*, and creating uncertainty, and significant amounts of litigation, regarding governments' regulation of their workplaces.

Second, *Abood* is a 40 year old precedent decided unanimously and reaffirmed multiple times by a unanimous Court. It has been applied consistently in the government employee context and relied upon by

the Court to resolve First Amendment questions in related contexts involving government restrictions on associational interests.

Third, *Abood* has created significant reliance interests. Twenty-three States and the District of Columbia have enacted statutes in reliance on this Court's decision—and not just those statutes, but these States' entire collective bargaining regimes, would have to be revised if *Abood* were overruled. Contracts entered into based on unions' ability to provide specified services, funded through agency fees, would have to be renegotiated. And government employees' existing reliance on unions' abilities to negotiate effectively and to provide contractually-required services would be eliminated.

Fourth, no changes in relevant facts or in society or in legal principles support overruling *Abood*. The decision's basic premise—that the government's vital interest in structuring its workforce permits government as an employer to take actions that would be unconstitutional in other contexts—has been consistently reaffirmed by this Court in a variety of contexts. And the responsibilities of government employees have, if anything, expanded in the four decades since *Abood* was decided, making even more essential government's greater flexibility when acting as an employer.

If anything has changed, moreover, it is that the burden on employees' speech interests has lessened. Developments in technology and social media make it easier than ever for individuals to express broadly and effectively any views different than those advanced by a union in collective bargaining negotiations.

Fifth, the *Abood* standard is workable, as the decisions of this Court and the lower courts make clear.

For all of these reasons, the Court should reject the request to overrule *Abood*.

ARGUMENT

THE COURT SHOULD NOT OVERRULE *ABOOD*.

A. *Stare decisis* preserves respect for the rule of law and the courts and appropriately cabins judicial discretion.

Stare decisis—"the idea that today's Court should stand by yesterday's decisions—is a foundation stone of the rule of law." *Kimble* v. *Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015) (internal quotations omitted).

That deep respect accorded to precedent—one of the law's "favorite and most fundamental maxims"—ensures that legal rules are not "uncertain and fluctuating * * * and liable to change with every change of times and circumstance." *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 87 (1807). Indeed, the Framers recognized that

> [t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them.

The Federalist No. 78 (Alexander Hamilton).

Most fundamentally, adhering to precedent is essential to maintain "public faith in the judiciary as a source of impersonal and reasoned judgments."

Moragne v. *States Marines Lines, Inc.*, 398 U.S. 375, 403 (1970). See also *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991) (*stare decisis* "contributes to the actual and perceived integrity of the judicial process"). It demonstrates "the wisdom of this Court as an institution transcending the moment," *Green* v. *United States*, 355 U.S. 184, 215 (1957) (Frankfurter, J., dissenting)—affirming that the Court's decisions are "founded in the law rather than in the proclivities of individuals." *Vasquez* v. *Hillery*, 474 U.S. 254, 265 (1986).

As Archibald Cox explained:

> Our system of constitutional adjudication depends upon a vast reservoir of respect for law and courts. * * * The acceptance of constitutional decisions * * * [rests] upon the understanding that what the judge decides is not simply his personal notion of what is desirable but the application of rules that apply to all men equally, yesterday, today, and tomorrow.

Archibald Cox, *The Warren Court: Constitutional Decision as an Instrument of Reform* 25-26 (1968). See also Jerold H. Israel, Gideon v. Wainwright: *The "Art" of Overruling*, 1963 Sup. Ct. Rev. 211, 218 (overruling precedent "raise[s] doubts both as to the Court's impersonality and as to the principled foundations of its decisions").

This consideration is particularly important today, when public regard for government institutions is at record low levels. See *Public Trust in Government: 1958-2017*, Pew Research Ctr. (May 3, 2017), perma.cc/864S-QCAX. The Judiciary retains public confidence and respect because it is perceived to

stand apart from the political branches, guided by longstanding principles of law rather than shifting political beliefs.

Adherence to *stare decisis* is therefore critical to maintaining respect for the Judiciary. Overruling precedent—and doing so by a narrow vote in circumstances in which the settled criteria for overruling are not satisfied—would be recognized as a significant deviation from the Court's traditions and inevitably will open the door to criticisms that could harm the Court's stature, and thereby diminish respect for the rule of law.

Stare decisis also furthers the practical interest in doctrinal stability—it enables citizens seeking to conform their conduct to the law to base their decisions on existing rules. "It is by the notoriety and stability of such rules that professional men can give safe advice * * * and people in general can venture with confidence to buy, and to trust, and to deal with each other." 1 James Kent, Commentaries on American Law 476 (2d ed. 1932). In Blackstone's words, *stare decisis* "keep[s] the scale of justice even and steady." 1 William Blackstone, Commentaries *69.

Given the important purposes served by the *stare decisis* principle, it is no exaggeration to say that "[t]he rule of law depends in large part on adherence to the doctrine of *stare decisis*." *Welch* v. *Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 478-479 (1987).

For these reasons, "even in constitutional cases," *stare decisis* "carries such persuasive force" that the Court has "always required a departure from precedents to be supported by some special justification." *United States* v. *IBM*, 517 U.S. 843, 856 (1996) (in-

ternal quotation marks omitted). See *Arizona* v. *Rumsey*, 467 U.S. 203, 212 (1984). The Court has identified a number of considerations relevant to this question. See *Montejo* v. *Louisiana*, 556 U.S. 778, 792-793 (2009). See also *Citizens United* v. *FEC*, 558 U.S. 310, 315 (2010).

First, mere disagreement with the prior holding is insufficient. "Even when the prior judicial resolution seems plainly wrong to a majority of the present Court," adhering to precedent often is appropriate because it "can contribute to the important notion that the law is impersonal in character, that the Court believes itself to be following a law which binds [it] as well as the litigants." Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 Colum. L. Rev. 723, 752 (1988) (internal quotation marks omitted). See also *Alleyne* v. *United States*, 133 S. Ct. 2151, 2164 (2013) (Sotomayor, J., concurring) ("Of course, under our doctrine of *stare decisis*, establishing that a decision was wrong does not, without more, justify overruling it.").

Thus, the Court has adhered to *stare decisis* even when it expresses significant reservations about the correctness of the original decision. See, *e.g.*, *Rhode Island* v. *Innis*, 446 U.S. 291, 304 (1980) (Burger, C.J., concurring in the judgment) (noting that after initial controversy, "[t]he meaning" of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), "ha[d] become reasonably clear and law enforcement practices ha[d] adjusted to its strictures"); *Runyon* v. *McCrary*, 427 U.S. 160, 190-191 (1976) (Stevens, J., concurring) (acknowledging that principles articulated in the controversial civil rights decision, *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968), had become "part of the fabric of

our law" during the intervening years, and thus were entitled to respect under *stare decisis*).

The Court will overrule a decision when it cannot be reconciled with subsequent legal developments or lacks a reasoned foundation. See, *e.g.*, *Agostini* v. *Felton*, 521 U.S. 203, 235-236 (1997) ("The doctrine of *stare decisis* does not preclude us from recognizing the change in our law and overruling *Aguilar* and those portions of *Ball* inconsistent with our more recent decisions.").

Second, the Court is less willing to overrule a precedent that is longstanding and well established. See, *e.g.*, *Montejo*, 556 U.S. at 793 (observing that because the questioned precedent was "only two decades old," it was entitled to less deference); *South Carolina* v. *Gathers*, 490 U.S. 805, 824 (1989) (Scalia, J., dissenting) ("The freshness of error not only deprives [precedent] of the respect to which long-established practice is entitled, but also counsels that the opportunity of correction be seized at once."), *overruled on other grounds by Payne*, 501 U.S. at 830.

This reluctance is enhanced when a unanimous Court decided the prior case. Cf. *Payne*, 501 U.S. at 828-830 (arguing that the relevant precedents were "decided by the narrowest of margins, over spirited dissents" and have been "questioned by Members of the Court" in later decisions); *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 530 (1985) (noting that the decision the Court was overruling was decided "by a sharply divided vote").

Third, the Court assesses whether changing social attitudes or other factual circumstances eroded the case's logical foundation. See, *e.g.*, *Citizens Unit-*

ed, 558 U.S. at 326 ("[D]ifferentiations [in the means of communication preferred for particular types of messages or speakers] might soon prove to be irrelevant or outdated by technologies that are in rapid flux."); *Brown* v. *Board of Educ.*, 347 U.S. 483, 492-493 (1954) ("In approaching this problem, we cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted, or even to 1896 when *Plessy* v. *Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation."); *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting) ("[T]his Court must * * * feel free to bring its opinions into agreement with experience and with facts newly ascertained.").

Fourth, the Court evaluates whether the original case has generated strong reliance interests. The Court has been committed to "introducing certainty and stability into the law and protecting the expectations of individuals and institutions that have acted in reliance on existing rules." *Walton* v. *Arizona*, 497 U.S. 639, 673 (1990) (Scalia, J., concurring in part and concurring in the judgment). These interests are especially strong in cases affecting commerce, as "individuals may have arranged their affairs in reliance on the expected stability of [the] decision." *Monroe* v. *Pape*, 365 U.S. 167, 221-222 (1961) (Frankfurter, J., dissenting in part). The Court is reluctant to overrule a precedent when parties have heavily relied on it.

Fifth, the Court assesses the precedent's workability. It may overrule a decision where its prior interpretation has proven "unsound in principle and unworkable in practice." *Webster* v. *Reproductive*

Health Servs., 492 U.S. 490, 518 (1989) (plurality opinion) (internal quotation marks omitted). The Court typically asks (1) whether it was able to articulate a manageable rule in the initial decision, and (2) whether the rule is sufficiently principled such that lower courts may apply it consistently. See, *e.g.*, *Pearson* v. *Callahan*, 555 U.S. 223, 235 (2009) (noting that lower courts' inability to consistently apply a rule "weigh[s] in favor of reconsideration"); *Vieth* v. *Jubelirer*, 541 U.S. 267, 305-306 (2004) (plurality opinion) (determining that *stare decisis* considerations were weak when the precedent was unable "to enunciate [a] judicially discernible and manageable standard"); *Garcia*, 469 U.S. at 556-557 (overruling *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), on the grounds that the Court was unable to devise a practically useful rule).

Not surprisingly, this demanding standard is rarely satisfied. A review of this Court's decisions over the last 77 years—from 1940 through 2017—reveals that the Court has expressly overruled only 94 constitutional precedents, or slightly more than one case per Term.[3]

And when the Court does overrule a precedent, it typically—in 59 percent of the cases—acts unanimously or near-unanimously, with two or fewer Justices in dissent. In only 21 cases (22 percent) did a

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[3] See *Supreme Court Decisions Overruled by Subsequent Decision*, Gov't Printing Off., perma.cc/VR4M-9C43. Data was gathered by selecting all constitutional cases decided on the merits since 1940 expressly overruling prior decisions.

bare majority of the Court overrule a constitutional precedent.[4]

The Court's practice thus confirms both its general reluctance to depart from *stare decisis* and its reluctance to overturn precedents by a narrow margin. Both factors are vital to protecting "the integrity of our constitutional system of government, both in appearance and in fact." *Vasquez*, 474 U.S. at 265-266.

B. *Stare decisis* considerations weigh heavily against overruling *Abood*.

Each of the factors identified by the Court as relevant to the *stare decisis* inquiry strongly favors upholding *Abood*:

- *Abood* is consistent with the Court's First Amendment jurisprudence. Indeed, overruling the *Abood* would undermine the standard articu-

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[4] *McDonald* v. *City of Chicago*, 561 U.S. 742 (2010); *Citizens United* v. *FEC*, 558 U.S. 310 (2010); *Montejo* v. *Louisiana*, 556 U.S. 778 (2009); *Gonzales* v. *Carhart*, 550 U.S. 124 (2007); *Parents Involved in Cmty. Schs.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Central Va. Cmty. Coll.* v. *Katz*, 546 U.S. 356 (2006); *Roper* v. *Simmons*, 543 U.S. 551 (2005); *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996); *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200 (1995); *United States* v. *Dixon*, 509 U.S. 688 (1993); *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); *United States* v. *Scott*, 437 U.S. 82 (1978); *National League of Cities* v. *Usery*, 426 U.S. 833 (1976); *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600 (1974); *Edelman* v. *Jordan*, 415 U.S. 651 (1974); *Miller* v. *California*, 413 U.S. 15 (1973); *Perez* v. *Campbell*, 402 U.S. 637 (1971); *Afroyim* v. *Rusk*, 387 U.S. 253 (1967); *Spevack* v. *Klein*, 385 U.S. 511 (1967); *Malloy* v. *Hogan*, 378 U.S. 1 (1964); *Elkins* v. *United States*, 364 U.S. 206 (1960). See *Supreme Court Decisions*, *supra* note 3.

lated in *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), and its progeny.

- *Abood* is a long-settled, frequently applied precedent that was decided by a unanimous Court.
- *Abood* has generated very substantial reliance interests among state governments and public sector employees.
- There have been no legal or factual changes in the past four decades to justify overruling *Abood*.
- *Abood* provides a workable standard that lower courts have applied consistently.

For all these reasons, *Abood* should not be overruled.

1. Overruling Abood *would undermine the principles in* Pickering *and its progeny that permit expansive regulation of government employees' speech.*

This Court has recognized that "government has significantly greater leeway in its dealings with citizen employees than it does when bringing its sovereign power to bear on citizens at large." *Engquist* v. *Oregon Dep't of Agric.*, 553 U.S. 591, 599 (2008).

Abood applies this principle in the First Amendment context. The Court held that "important government interests" in a stable labor force "support the impingement upon associational freedom." 431 U.S. at 225.

Pickering similarly recognizes that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general"—and that these interests permit speech restrictions that could not be extended

to the citizenry at large. 391 U.S. 563, 568 (1968). The Court has routinely applied *Pickering* to uphold government restrictions on employee speech. *E.g.*, *Borough of Duryea* v. *Guarnieri*, 564 U.S. 379, 386, 399 (2011); *Connick* v. *Myers*, 461 U.S. 138, 154 (1983).

The *Pickering* test requires that a public employee alleging an infringement of First Amendment rights in the employment context first show "that he or she spoke as a citizen on a matter of public concern." *Guarnieri*, 564 U.S. at 386. If the employee satisfies that test, the court must "balance the First Amendment interest of the employee against 'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" *Ibid.* (quoting *Pickering*, 391 U.S. at 568).

Abood rests on precisely the same logic, and draws essentially the same distinction. It authorizes the government to regulate associational conduct relating to the negotiation of matters of private concern, such as salaries, employment benefits, and hours. It does so, like *Pickering*, because of the government's weighty interest in the efficient administration of its workforce. And *Abood*, like *Pickering*, distinguishes between matters internal to the workplace and questions of political concern.

Because the key legal principles underlying *Pickering* and *Abood* are essentially identical, overruling *Abood* would cast very substantial doubt on the continuing validity of the more relaxed standards gov-

erning government regulation of employee speech applied in *Pickering* and its progeny.[5]

First, overruling *Abood* would undermine the Court's holdings that the government's "substantial" interests "in managing its internal affairs" justify reduced First Amendment scrutiny of government restriction of employee speech. *E.g.*, *Guarnieri*, 564 U.S. at 392-393. In particular, it would disrupt the balance struck in those cases between "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568.

To overrule *Abood*, the Court would have to either (a) reverse its conclusion that agency fees are sufficiently justified by "the government's vital policy interest in labor peace and avoiding 'free riders,'" *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991); or (b) conclude that the States adopting the agency-fee approach had not sufficiently demonstrated that the fees play a vital role in "protect[ing] the public from harmful disruptions to government services and programs," Brief for New York et al. as *Amici Curiae* Supporting Respondents, 13, *Friedrichs* v. *California Teachers Ass'n*, 136 S. Ct. 1083 (2016).

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[5] The *Harris* Court held that any analogy to *Pickering* was inapposite because that case did not involve government employees—"with respect to * * * personal assistants, the State is not acting in a traditional employer role." 134 S. Ct. 2618, 2642 (2014). That distinction does not apply here.

Holding that the government's interest as an employer recognized in *Abood* is not sufficiently weighty to justify greater limitations on employees' associational activities would inevitably apply to governments' invocation of the very same interest in the employee speech context, and therefore reduce the scope of regulation permissible in the workplace speech context addressed in *Pickering*.

More searching scrutiny of the asserted government interest would overturn this Court's practice of "consistently [affording] greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large." *Waters* v. *Churchill*, 511 U.S. 661, 673 (1994) (plurality opinion). That withdrawal of deference could not logically be limited to the *Abood* context, but would necessarily require greater scrutiny and skepticism of government justifications in the employee speech context as well.

Overruling *Abood* therefore would lead inevitably to significantly greater limitations on government regulation of employee speech in the workplace.

Second, overturning *Abood* would produce an even greater cut-back in governments' authority under *Pickering*, because the impact of *Abood* on employees' constitutional rights is much more limited than that of *Pickering*. And if *Abood* were held to work an unconstitutional intrusion on employees' First Amendment rights, then *a fortiori* many restrictions upheld under *Pickering* will become unconstitutional.

Abood imposes a limited restriction on government employees, and it imposes no burden whatsoever on the public's interest in a robust dialogue. That is because employees remain free to express their political views in many available forums. *See Lehnert*, 500 U.S. at 521 ("Individual employees are free to petition their neighbors and government in opposition to the union which represents them in the workplace.").

Accordingly, the community is not "deprived of informed opinions on important public issues." *City of San Diego* v. *Roe*, 543 U.S. 77, 82 (2004). And employees are not deprived of their ability to express their views.

Under *Pickering*, however, employees may be precluded more broadly from expressing their views regarding matters relating to the workplace. That is a much more extensive limitation.

By overruling *Abood*, the Court would elevate the interests of the employees over the government's employment interests, despite the government's deep concerns that its efficiency would be hampered and the fact that employees would have ample alternative channels to disseminate their views and enrich public discourse. That would inevitably produce significant new limitations on the government's existing authority to regulate employee speech.

Third, the arguments for overruling *Abood* rest on the contention that government workplace matters—benefits, salary, and other employment conditions, as well as agency fees that support such activities—are topics of public concern. But the Court has reached the contrary conclusion in the *Pickering* line of cases.

Speech involves matters of public concern, the Court has held, when it is "addressed to a public audience, * * * made outside the workplace, and * * * largely unrelated to their Government employment." *United States* v. *National Treasury Emps. Union*, 513 U.S. 454, 466 (1995); see also *Roe*, 543 U.S. at 83-84 (holding that employee's speech did not touch on public concern when it "did nothing to inform the public about any aspect of the [government employer's] functioning or operation").

The Court in *Guarnieri* distinguished matters such as "working conditions, pay, discipline, promotions, leave, vacations, and terminations"—making clear that such matters do *not* involve matters of public concern and that government restriction of such speech is not appropriate for "invasive judicial superintendence." 564 U.S. 390-391. See also *Connick*, 461 U.S. at 149 (holding that speech touching on "internal office affairs" does not involve matters of public concern).

Unions use agency fees to negotiate the very everyday workplace matters—such as wages, hours, and grievance processes—that the *Guarnieri* Court held to be matters of private concern as to which speech could be limited without violating the First Amendment. If *Abood* is overturned on the ground that speech about public employees' salaries and benefits involves matters of public concern, then the ability of government to limit speech about such matters under *Pickering* and its progeny would be significantly limited. Governments would be unable to discipline insubordinate employees without exposing themselves to the kind of liability the *Pickering* test has thus far precluded.

Though a union's collective bargaining position has greater budgetary consequences than a single employee's complaints about his or her benefits, overruling *Abood* would also raise a thorny question for judges applying *Pickering*: How much money must be in dispute in order for speech about wages and benefits to become matters of public concern? This question would require judicial "intrusion into internal governmental affairs" that the Court has sought to avoid in these cases. *Guarnieri*, 564 U.S. at 380. Further, attempting to distinguish between financially consequential and inconsequential workplace speech would be unworkable. Public employees could transform their private employment complaints into speech on matters of public concern merely by recasting their grievance in collective terms.

To illustrate how overruling *Abood* would distort the application of *Pickering*, consider a public employee who is disciplined after frequently proclaiming dissatisfaction with the number of allotted vacation days. Under *Pickering*, such an employee would likely have no claim. But if *Abood* were overruled, that same employee could argue that because vacation days affect public spending, her speech is entitled to "matter of public concern" protection.

A concrete case from the lower courts further demonstrates this point. In *Communications Workers of Am.* v. *Ector Cty. Hosp. Dist.*, 467 F.3d 427 (5th Cir. 2006) (en banc), the Fifth Circuit entered judgment for a public hospital that disciplined an employee for wearing a button with the slogan "Union Yes" in violation of the dress code. That court reasoned that under *Pickering*, the employee's speech "touched upon or involved matters of public concern

only insubstantially and in a weak and attenuated sense." *Id.* at 437. It was nothing more than an "implicit assertion that the employee is a union member and believes working conditions and/or compensation would be better for him, and perhaps for most fellow employees, if more Hospital employees were union members." *Id.* at 438.

If *Abood* were overruled, that employee could argue his speech *did* involve issues of public concern precisely because working conditions "for most fellow employees" have a significant budgetary impact. Overruling *Abood* would eviscerate *Pickering* and produce the very "constitutionaliz[ation of] the employee grievance," that this Court has sought to avoid. *Connick*, 461 U.S. at 154.

In short, overruling *Abood* would undermine *Pickering* and elevate internal workplace speech about wages and benefits to the status of matters of public concern. This would drastically limit the discretion afforded to government employers under *Pickering* and create uncertainty—and significant amounts of litigation—regarding governments' authority over their workplaces.

2. Abood *is a long-established, frequently applied precedent.*

Stare decisis weighs particularly heavily against overturning long-established precedents, as "society adjusts itself to their existence, and the surrounding law becomes premised upon their validity." *Gathers*, 490 U.S. at 824 (Scalia, J., dissenting). *Abood* is just such a case.

This Court's decision in *Abood* 40 years ago was unanimous, and this Court reaffirmed and applied *Abood*'s holding in the union context. See, *e.g.*, *Locke*

v. *Karass*, 555 U.S. 207, 213 (2009) (unanimous); *Davenport* v. *Washington Educ. Ass'n*, 551 U.S. 177, 181 (2007) (unanimous); *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507, 516-517 (1991) (unanimous); *Chicago Teachers Union* v. *Hudson*, 475 U.S. 292, 301-302 (1986) (unanimous); *Eliis* v. *Brotherhood of Ry., Airline & Steamship Clerks*, 466 U.S. 435, 447 (1984) (Justice Powell's dissent did not take issue with *Abood*'s First Amendment analysis).

In particular, the Court in 2009 unanimously reaffirmed *Abood*'s holding, concluding that the First Amendment "permits the government to require both public sector and private sector employees who do not wish to join a union * * * to pay that union a service fee as a condition of the continued employment." *Locke*, 555 U.S. at 213.

The Court also has relied upon *Abood*'s holding to uphold government regulations of speech in analogous contexts. Thus, *Keller* v. *State Bar of Cal.*, 496 U.S. 1, 16 (1990), unanimously reversed a lower court ruling that "declin[ed] to apply [the] *Abood* decision to the activities of the State Bar." The Court uses *Abood*'s standard to determine the proper status under the First Amendment for compulsory payments relating to agricultural marketing programs. *Johanns* v. *Livestock Mktg. Ass'n*, 544 U.S. 550, 558 (2005); *United States* v. *United Foods, Inc.*, 533 U.S. 405, 413-414 (2001); *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 471-473 (1997). And the Court invokes *Abood* in assessing challenges to student participation fees charged by state universities. *Board of Regents* v. *Southworth*, 529 U.S. 217, 230 (2000); *Rosenberger* v. *Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 840 (1995).

Most importantly, *Abood*'s analysis was not questioned in any of these cases—indeed, it was not questioned by the Court, or by any Justice in a separate opinion, until the ruling three years ago in *Knox* v. *SEIU*, 567 U.S. 298 (2012). That was 35 years after *Abood* was decided and years after this Court's decisions reaffirming and applying *Abood*.

Finally, frequent application of *Abood* is not limited to this Court. The lower appellate courts, too, have applied the principle set forth in *Abood* and its progeny in numerous rulings in a variety of First Amendment contexts:

- At least 16 challenges involving government employment;[6]
- At least nine challenges to bar association fees;[7] and

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[6] *Schlaud* v. *Snyder*, 785 F.3d 1119 (6th Cir. 2015); *Wisconsin Educ. Ass'n Council* v. *Walker*, 705 F.3d 640 (7th Cir. 2013); *Hallinan* v. *Fraternal Order of Police*, 570 F.3d 811 (7th Cir. 2009); *Cummings* v. *Connell*, 316 F.3d 886 (9th Cir. 2003); *Wessel* v. *City of Albuquerque*, 299 F.3d 1186 (10th Cir. 2002); *Prescott* v. *County of El Dorado*, 177 F.3d 1102 (9th Cir. 1999); *Bromley* v. *Michigan Educ. Ass'n-NEA*, 82 F.3d 686 (6th Cir. 1996); *Weaver* v. *University of Cincinnati*, 970 F.2d 1523 (6th Cir. 1992); *Ping* v. *NEA*, 870 F.2d 1369 (7th Cir. 1989); *Lowary* v. *Lexington Local Bd. of Educ.*, 854 F.2d 131 (6th Cir. 1988); *Perry* v. *Local Lodge 2569*, 708 F.2d 1258 (7th Cir. 1983); *Morris* v. *City of Kokomo*, 381 N.E.2d 510 (Ind. Ct. App. 1978); *Lyons* v. *Labor Relations Comm'n*, 492 N.E.2d 343 (Mass. 1986); *Belhumeur* v. *Labor Relations Comm'n*, 735 N.E.2d 860 (Mass. 2000); *White Cloud Educ. Ass'n* v. *White Cloud Bd. of Educ.*, 300 N.W.2d 551 (Mich. Ct. App. 1980); *Elvin* v. *Oregon Pub. Emps. Union*, 832 P.2d 36 (Or. 1992).

[7] *Fleck* v. *Wetch*, 868 F.3d 652 (8th Cir. 2017); *Kingstad* v. *State Bar of Wis.*, 622 F.3d 708 (7th Cir. 2010); *Romero* v.

- At least eight challenges to student activity fees.[8]

Abood is thus not only a long-standing decision that has been reaffirmed frequently, but also a ruling that is well integrated into this Court's First Amendment jurisprudence and the decisional fabric of the lower courts. That reality weighs heavily against overruling *Abood*.

3. Abood *has generated substantial public and private reliance interests.*

Stare decisis has significantly added force "when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision." *Hilton* v. *South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991). Here, the reliance interests are especially strong for two interrelated reasons.

First, States would be forced "to reexamine their statutes" if *Abood* were overruled. *Id.* at 203. "Stare

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Colegio de Abogados de Puerto Rico, 204 F.3d 291 (1st Cir. 2000); *Morrow* v. *State Bar of Cal.*, 188 F.3d 1174, 1175 (9th Cir. 1999); *Washington Legal Found.* v. *Massachusetts Bar Found.*, 993 F.2d 962 (1st Cir. 1993); *Schneider* v. *Colegio de Abogados de Puerto Rico*, 917 F.2d 620 (1st Cir. 1990); *Hollar* v. *Government of the Virgin Islands.*, 857 F.2d 163 (3d Cir. 1988); *Levine* v. *Heffernan*, 864 F.2d 457 (7th Cir. 1988); *Romany* v. *Colegio de Abogados de Puerto Rico*, 742 F.2d 32 (1st Cir. 1984); *Florida Bar re Frankel*, 581 So. 2d 1294 (Fla. 1991).

[8] *Amidon* v. *Student Ass'n*, 508 F.3d 94 (2d Cir. 2007); *Rounds* v. *Oregon State Bd. of Higher Educ.*, 166 F.3d 1032 (9th Cir. 1999); *Goehring* v. *Brophy*, 94 F.3d 1294 (9th Cir. 1996); *Carroll* v. *Blinken*, 957 F.2d 991 (2d Cir. 1992); *Hays Cty. Guardian* v. *Supple*, 969 F.2d 111 (5th Cir. 1992); *Kania* v. *Fordham*, 702 F.2d 475 (4th Cir. 1983); *Galda* v. *Bloustein*, 686 F.2d 159 (3d Cir. 1982); *Smith* v. *Regents of the U. of Cal.*, 844 P.2d 500 (Cal. 1993).

decisis has added force" when a legislature "acted in reliance on a previous decision" and overruling would "require an extensive legislative response." *Id.* at 202. See also *Bush* v. *Vera*, 517 U.S. 952, 985 (1996) (plurality opinion) (declining to overrule prior decisions where legislators "have modified their practices * * * in response to [precedent]"); *Allied-Signal, Inc.* v. *Director, Div. of Taxation*, 504 U.S. 768, 785 (1992) (refusing to overturn precedent when it would "invalidate" state tax codes established in reliance on past decisions).

Twenty-three States and the District of Columbia—exercising their sovereign authority in reliance on *Abood*—made the policy choice to adopt collective bargaining systems that provide for agency fees. Other States made a different choice. The decision thus protects state sovereignty by affording flexibility—based on the different First Amendment balance applicable in the public employment context—so that States may choose the collective bargaining approach appropriate in light of their different histories of labor relations and different policy preferences.[9]

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[9] Many of the States that do not permit agency-shop fees experienced "no history of public-sector labor unrest or a much milder history than States with broader public-sector collective bargaining and authorization for agency fees." Brief for New York et al. as *Amici Curiae* Supporting Respondents at 33, *Friedrichs*, 136 S. Ct. 1083 (2016). For example, a public schoolteacher walkout in New York City in 1968 caused massive disruption in the City's schools. The walkout forced over one million students to miss over a month of classes. *Id.* at 17. States with a history of labor disruption logically concluded that financially-stable unions would be able to engage in collective-bargaining negotiations that would avert such crises.

Indeed, cases moving a step beyond the question of representation fees—and challenging on First Amendment grounds a State's designation of a union as an exclusive bargaining representative—have been filed in increasing numbers. Those claims have been rejected, based on *Abood* and *Minnesota State Board for Community Colleges* v. *Knight*, 465 U.S. 271 (1984), which itself relied on *Abood* (see 465 U.S. at 291). See, *e.g.*, *Jarvis* v. *Cuomo*, 660 Fed. App'x 72 (2d Cir. 2016); *Hill* v. *SEIU*, 850 F.3d 861 (7th Cir. 2017); *Mentele* v. *Inslee*, 2016 WL 3017713 (W.D. Wash. 2016). But the issue would be reopened if *Abood* were overruled, possibly eliminating entirely a State's decision to adopt a collective bargaining approach with respect to its employees.

Overruling *Abood* would invalidate the choice made by States containing roughly half of the Nation's population. It would disrupt those States' collective bargaining systems—adopted in reliance on this Court's decisions—require the States to enact new laws, and force them to adhere to a uniform framework that takes no account of their own distinctive history, labor market considerations, and policy judgments. That reality is a powerful reason for adhering to *stare decisis*.

Second, because *Abood* involves "property and contract rights," *stare decisis* considerations "are at their acme." *State Oil Co.* v. *Khan*, 522 U.S. 3, 20 (1997). States and unions have relied on *Abood* to "negotiat[e] their contracts and structur[e] their transactions." *Michigan* v. *Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014).

By addressing the dangers posed by free riders, agency fees play a critical role in shaping public employer-employee relations. For example, unions have

taken on contractual obligations to provide a variety of services to the State and to employees based on the expectation of receipts from agency fees.

Eliminating such a foundational element of the labor framework could invalidate those contracts—requiring renegotiation of agreements covering nearly ten million employees at the same time that the States are forced to enact new laws governing relations with their employees. The likelihood of massive disruption of public employee labor relations is great.

Government employees, too, have relied legitimately upon *Abood*—depending on their exclusive bargaining agent to represent them effectively in negotiations for wages and benefits, and to have the financial resources to execute not only that obligation but any responsibilities assigned to the union under the contract. These duties are expensive. To adequately represent all employees, unions rely on "lawyers, expert negotiators, economists, and a research staff, as well as general administrative personnel." *Lehnert*, 500 U.S. at 553 (Scalia, J., concurring in the judgment in part and dissenting in part) (quoting *Abood*, 431 U.S. at 221). The union must have sufficient expertise to negotiate complex issues such as healthcare provisions.

In the absence of agency fees, many employees may choose to free ride, leaving the underfunded union unable to adequately represent employees. As the quality of representation deteriorates, millions of employees who relied on the union to advance their interests for 40 years will suffer as employee benefits are reduced or eliminated.

Over nearly four decades, States, individual employees, and unions have structured their economic

activity in reliance on the Court's decision upholding agency fees. These unusually strong reliance interests weigh in favor of affirming *Abood*.

4. No legal or factual changes justify overruling Abood.

A precedent is accorded reduced deference when the legal or factual basis for the decision has been eroded. See, *e.g.*, *Citizens United*, 558 U.S. at 364 (noting that technological changes "counsel against upholding a law that restricts political speech in certain media or by certain speakers"). That reason for an exception to *stare decisis* does not apply here.

The intervening decades have not diminished *Abood*'s premise that a government has a vital interest in structuring its workforce and that government's interest as an employer in overseeing its employees is significantly different in kind from its interest in regulating citizens generally. Indeed, as state and local governments have been obligated to take on more significant problems, the importance of government's ability to exercise its authority as an employer has only increased.

Public sector employment makes up roughly the same share of the total workforce that it did at that time.[10] The potential harm to governments' operational efficiency, therefore, is just the same, if not more significant, compared to 1977.

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[10] The percentage of the workforce employed by local and state governments is about the same as it was in 1977, when *Abood* was decided. See Philip Bump, *The Percent of Employed People Working for the Federal Government Is at the Lowest Level on Record*, Wash. Post (Jan. 9, 2015), perma.cc/6LPJ-NQKR.

Nor have changes to society in any way eroded *Abood*'s rationale. State and local governments continue to rely on *Abood* as much, if not more, than they did 40 years ago. Indeed, in the 40 years since *Abood* was decided, nearly half the States have concluded that an agency-fee approach is most conducive to labor peace and an effective collective bargaining system—and avoiding massive disruptions to government operations. Brief for New York et al. as *Amici Curiae* Supporting Respondents, 13-30, *Friedrichs*, 136 S. Ct. 1083 (2016). And the limitation on public employees has not grown more burdensome since *Abood* was decided.

Rather, there is reason to believe that the burden has decreased. *Abood* recognized that a public employee who disagrees with union representation "is largely free to express his views, in public or private, orally or in writing. * * * [P]ublic employees are free to participate in the full range of political activities." 431 U.S. at 230. That is more true than ever because technological advances and the explosion of social media provide many *additional* opportunities for dissenting government employees to disseminate their views publicly.

Over the four decades during which this Court has reaffirmed *Abood* multiple times, no factual or societal developments have undermined the decision's central logic. To the contrary, *Abood*'s fundamental insight—that governments have an especially weighty interest when acting as an employer, and that interest justifies, indeed necessitates, greater intrusion on First Amendment interests—remains as true today as it was in 1977. There simply is no basis for overturning *Abood*.

5. Abood *establishes a workable standard.*

A final factor relevant to the *stare decisis* inquiry is whether the precedent's standard is capable of consistent application by the lower courts. *Cf. Garcia*, 469 U.S. at 531 (overruling precedent where it "is not only unworkable but is also inconsistent with established principles of federalism"); *FEC* v. *Wisconsin Right to Life, Inc.*, 551 U.S. 449, 501 (2007) (Scalia, J., concurring) ("Of particular relevance to the *stare decisis* question in these cases is the impracticability of the regime created by *McConnell*. *Stare decisis* considerations carry little weight when an erroneous governing decision has created an unworkable legal regime.") (quotation marks omitted).

The Court does not equate controversy with unworkability, however. The fact that a precedent touches on controversial issues and triggers opposition does not mean that the precedent's standard is unworkable.

The Court in *Abood* recognized that—as with numerous other precedents of this Court that involve distinguishing between categories of conduct—"[t]here will, of course, be difficult problems in drawing lines between collective bargaining * * * and ideological activities." 431 U.S. at 236. But the Court has resolved these without disturbing *Abood*'s central framework.

In 2009, the Court unanimously explained the standard for determining whether national litigation expenses are chargeable under *Abood*. See *Locke*, 555 U.S. at 209-210. Likewise, in *Chicago Teachers Union* v. *Hudson*, 475 U.S. 292 (1986), the Court agreed—unanimously—that procedural safeguards

were necessary to prevent nonunion employees from compulsorily subsidizing nonchargeable activity. These cases illustrate that *Abood* is as workable as any of the other cases in the myriad areas of the law where judges must exercise judgment.

Abood's fundamental distinction between agency-shop fees for collective bargaining and political activities is workable and has been applied consistently by this Court. There simply is no basis for departing from *stare decisis*.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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